

STATE OF MICHIGAN
COURT OF APPEALS

MAUREEN CHILDREY,

Plaintiff-Appellant,

v

CAPITAL AREA COMMUNITY SERVICES, INC.
and IVAN W. LOVE, JR.,

Defendants-Appellees.

UNPUBLISHED

March 5, 1999

Nos. 204050, 207843

Ingham Circuit Court

LC No. 95-080317 NO

Before: Jansen, P.J. and Sawyer and Markman, JJ.

PER CURIAM.

Plaintiff appeals of right from an opinion and order granting summary disposition to defendants under MCR 2.116(C)(8) and (10). Defendants appeal by leave granted from an order denying their motion for mediation sanctions. These appeals have been consolidated by this Court. We affirm the grant of summary disposition, reverse the denial of the motion for mediation sanctions and remand for further proceedings.

On appeal, a trial court's decision to grant summary disposition is reviewed de novo. *Singerman v Municipal Service Bureau Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). Defendants relied on both MCR 2.116(C)(8) and (10) for their motion. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim and is reviewed on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted; the motion must be granted if no factual development could justify the claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. "The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Id.*

Plaintiff first contends that the trial court erred in granting summary disposition on her breach of contract claim. She claims she was a just-cause employee and that defendants terminated her employment without just cause. Plaintiff primarily bases this argument on language contained in the personnel policies and procedures manual, which plaintiff alleges can be read to imply that employees

are terminable based only on just cause. In *Lytle v Malady (On Rehearing)*, 458 Mich 153; 163-164; 579 NW2d 906 (1998), the Supreme Court stated that there are three ways that a plaintiff can prove just-cause employment.

(1) proof of “a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause”; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer’s policies and procedures instill a “legitimate expectation of job security in the employee. [Footnotes omitted.]

With respect to (1), plaintiff points to no contractual provision which either provides for a definite term of employment or forbids discharge absent just cause. With respect to (2), plaintiff argues, on the one hand, that the language of the personnel policies and procedures manual was in conflict and that such conflicting language created a jury question. On the other hand, plaintiff argues that the manual contained an express agreement regarding job security that was clear and unequivocal. It is hard to understand how the language of the manual could simultaneously be ambiguous, but also clear and unequivocal. In any event, our review of the language of the manual reveals no such “clear and unequivocal” language; indeed, it reveals exactly the contrary. Section 1.2 of the Manual specifies as follows:

“It is not the intent of these policies and procedures to be construed as creating any contract between CACS and any applicable employee, or group of employees. These policies and procedures shall not grant a right of any employee to be continued in his/her employment, or to limit the right of CACS to terminate its employees, with or without cause.”

Section 19.2e further specifies that “Nothing in these policies shall modify the employee’s at-will status.”¹

Nor has plaintiff demonstrated that defendants’ policies and procedures instilled a “legitimate expectation” of job security. *Lytle, supra* at 164. The Supreme Court has set forth a two-step inquiry for evaluating legitimate-expectation claims:

The first step is to decide “what, if anything, the employer has promised,” and the second requires a determination of whether that promise is “reasonably capable of instilling a legitimate expectation of just-cause employment.” [*Id.* at 164-65.]

The sections of the personnel policies and procedures manual submitted by the parties contain several express statements that the manual is not intended to grant any right to an employee to be continued in employment, and that it does not limit the right of the employer to discharge an employee with or without just cause or to modify the employee’s at-will status. In *Lytle, supra* at 169, and in *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 413-14; 550 NW2d 243 (1996), the Supreme Court has held that “provisions in a handbook will not create enforceable rights when the handbook expressly states that such provisions are not intended to create an employment contract.” In light of the

express disclaimers contained in defendants' personnel policies and procedures manual, plaintiff has failed to show that she could have had a legitimate expectation of just-cause employment. *Lytle, supra* at 169-71.

Plaintiff's argument that her discharge was contrary to public policy because it was retaliatory for her refusal to sign a revised employment agreement will not be reviewed because it was not raised in the trial court. *Brown v Michigan Bell Telephone, Inc (On Remand)*, 225 Mich App 617, 626; 572 NW2d 33 (1997). Finally, plaintiff's arguments regarding defendants' alleged "bad faith" and the alleged lack of reasonable notice of the revisions are meritless. Plaintiff failed to demonstrate any "bad faith" by defendants where all employees were required to sign the revised employment agreement and where another employee who refused to sign was also discharged. The record demonstrates that plaintiff received ample notice of the revised employment agreement.

Plaintiff next contends that the trial court erred in granting summary disposition on her invasion of privacy claim. She claims that defendants invaded her privacy when they hired a private investigator to conduct an investigation into her private life and when they disclosed plaintiff's personnel file to an attorney. Plaintiff claims these actions violated her right of privacy in two ways: by intruding upon her seclusion and by disclosing private information. To prove a claim of invasion of privacy based on intrusion upon seclusion, a plaintiff must show "(1) an intrusion by the defendant (2) into a matter in which the plaintiff has a right of privacy (3) by a means or method that is objectionable to a reasonable person." *Saldana v Kelsey-Hayes Co*, 178 Mich App 230, 233; 433 NW2d 382 (1989). The right to be free from intrusion is not, however, absolute; "such a right does not extend so far as to subvert those rights which spring from social conditions, including business relations." *Lewis v Dayton-Hudson Corp*, 128 Mich App 165, 169; 339 NW2d 857 (1983), citing *Earp v Detroit*, 16 Mich App 271, 276; 167 NW2d 841 (1969).

The record indicates that defendants hired a private investigator to conduct an inquiry into allegations that plaintiff had attempted to hire someone to kill her supervisor and that she was involved in an illegal scheme to import and sell babies from Mexico. Both allegations involved possible illegal conduct that would have adversely reflected upon defendants and therefore were properly subject to their investigation. *Earp, supra* at 281-82. Further, the record indicates that the investigator only examined publicly-available records. Under the circumstances, this does not appear to be improperly intrusive.

Similarly, the release of plaintiff's personnel file to an attorney does not amount to an invasion of privacy by public disclosure of embarrassing facts. This issue is resolved by reviewing the facts of the case. *Beaumont v Brown*, 401 Mich 80, 100; 257 NW2d 522 (1977). The Supreme Court observed in *Beaumont* that this cause of action required "unnecessary publicity" and an "unreasonable and serious interference with the plaintiff's interest in not having his affairs known to others." *Id.* at 104. The Court further indicated that it would not place a limit on the number of persons to whom such a disclosure must be made since that would have to be determined in each future case. *Id.* at 105. In this case, the disclosure of a personnel file to one attorney in connection with a lawsuit initiated by a criminal complaint filed by plaintiff would not appear to constitute a public disclosure. Since the criminal case never went to trial, there was no further "public" disclosure of the file. Moreover, the record does not

indicate what was contained in plaintiff's personnel file and thus it cannot be determined if this alleged disclosure constituted "unnecessary publicity" and an "unreasonable and serious interference with the plaintiff's interest in not having [her] affairs known to others." Therefore, plaintiff did not present sufficient evidence to establish a genuine issue of material fact with regard to the disclosure of her personnel file.

Plaintiff next contends that the trial court erred in granting summary disposition of her claim under the Employee Right to Know Act, MCL 423.501 *et seq.*; MSA 17.62(1) *et seq.* She argues that defendants violated this act by disclosing her personnel file to an attorney, by seeking private, nonemployment-related information about her through the use of the revised employment agreement, and by maintaining a separate file pertaining to their investigation of the alleged criminal behavior by plaintiff without providing her proper notification. These allegations encompass §§ 6, 8, and 9 of the act. However, in her complaint plaintiff pleaded only a violation of § 8 of the act. The trial court thus properly refused to consider plaintiff's allegations in her response to defendants' summary disposition motion that raised claims under §§ 6 and 9. With respect to the alleged violation of § 8, MCL 423.508; MSA 17.62(8), that section prohibits collecting certain types of information unless there is a written authorization from the employee. As the trial court correctly concluded, the Act by implication permits the employer to ask the employee for authorization to collect the specified information. Defendants made such a request and plaintiff refused by declining to sign the employment agreement and two release forms. Accordingly, plaintiff failed to establish that defendants ever gathered or maintained any of the specified information and therefore she has failed to demonstrate that defendants violated the Act.

Plaintiff finally contends that the trial court erred in summarily ruling on her claim under the Michigan Handicappers' Civil Rights Act [HCRA], MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* In her complaint, plaintiff alleged that her handicap was a heart condition. However, in her response to the summary disposition motion and on appeal, plaintiff alleged that her handicap was the "perception" by defendants that she had psychological problems. In order to make out a prima facie case of discrimination under the HCRA, plaintiff had to demonstrate that (1) she was handicapped as defined by the HCRA; (2) that the handicap was unrelated to her ability to perform the duties of her job; and (3) that she was discriminated against in one of the ways described in the statute. *Tranker v Figgie Int'l, Inc.*, 221 Mich App 7, 11; 561 NW2d 397 (1997). Plaintiff also was required to present evidence showing that defendants intended to discriminate against her on the basis of her handicap. *Welch v General Motors Corp.*, 205 Mich App 517, 521; 517 NW2d 819 (1994).

Plaintiff failed to show that she was discriminated against on the basis of her heart condition. There is no evidence that plaintiff was not discharged solely because she refused to sign an employment agreement, not because of her heart condition. Plaintiff argues that the request that she sign the agreement was a pretext, and that she was actually discharged because of her handicap; however, *all* employees were required to sign the agreement or be discharged, and plaintiff presents no evidence that this requirement was pretextual. Therefore, the trial court correctly granted summary disposition as on this claim.

Plaintiff now argues that she was discriminated against because of defendants' perception that she had a drug problem. Plaintiff is correct that a perception that an individual is handicapped can be a handicap as defined by the statute. *Merillat v Michigan State University*, 207 Mich App 240, 245; 523 NW2d 802 (1994). However, an actual drug problem would presumably affect plaintiff's ability to perform her job and thus would not qualify as a handicap under the statute. MCL 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(A). The HCRA permits the establishment of policies and rules concerning the use of alcoholic beverages and illegal drugs, MCL 37.1211(a); MSA 3.550(112)(a); defendants had established such policies. Moreover, plaintiff submitted to the drug test, and there is no evidence to suggest that plaintiff was discharged for anything related to the request that she take a drug test or to the results of the test itself. Plaintiff therefore failed to present evidence to show that she could prove a prima facie case of discrimination under the HCRA and the trial court correctly granted summary disposition on this claim.

In their separate appeal, defendants contend that the trial court erred in refusing to grant their motion for mediation sanctions. This is a legal issue involving interpretation of a court rule that is reviewed de novo. *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 397; 554 NW2d 345 (1996). "Court rules are construed in the same manner as statutes . . . if the language of the court rule is clear, this Court should apply it as written." *Id.* At all relevant times in the trial court, MCR 2.403(O)(1) provided that the case had to be resolved by a "verdict" and MCR 2.403(O)(2) defined "verdict" to include "a judgment entered as a result of a ruling on a motion filed after mediation."² There is no dispute that the motion for summary disposition was filed after mediation had occurred. Thus, under the clear language of the court rule, the judgment rendered on defendants' motion for summary disposition was a "verdict" within the meaning of MCR 2.403(O)(2)(c).

Plaintiff argues, and the trial court apparently agreed that the offer of judgment rule, MCR 2.405(E), should control. However, under the then-existing version of MCR 2.405(A)(4), a "verdict" only included a judgment by a jury or by the court in a non-jury case; it did not include a judgment pursuant to a pretrial motion.³ *Freeman v Consumers Power Co*, 437 Mich 514, 519; 473 NW2d 63 (1991); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 364-365; 466 NW2d 404 (1991). Thus, there was no need for the court to have determined whether the mediation or the rejection of the offer of judgment occurred later in time. Cf. *Luidens v. 63rd District Court*, 219 Mich App 24, 28-9; 555 NW2d 709 (1996). Therefore, the offer of judgment court rule was inapplicable to the decision of whether sanctions ought to be imposed and defendants' request for mandatory sanctions under the mediation sanctions court rule should have been granted.

The grant of summary disposition is affirmed and the case is reversed and remanded for imposition of mediation sanctions under the then-existing version of MCR 2.403(O). We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ David H. Sawyer

/s/ Stephen J. Markman

¹ We do not find that the language of § 19.3, limiting discipline to violations of a known set of rules, satisfies plaintiff's burdens, nor that the language in § 8.2 that an employee "will not be subject to any arbitrary demotion or dismissal" as long as they successfully perform their duties is sufficient to constitute a "clear and unequivocal" promise of just-cause employment. *Lytle*, supra at 165-66.

² MCR 2.403(O)(2)(c) has since been amended (effective October 1, 1997) to apply to "a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation."

³ MCR 2.405(A)(4)(c) has since been appended (effective October 1, 1997) to include "a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment."